No. 337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS NO. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioners,

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A CORPORATION, EAGLE-PICHER LEAD COMPANY, A CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

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OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate back pay provisions of the decree and to remand, and dismissing the petition (R. 307-311) is reported in 141 F.(2d) 843. The order of the court denying petitioners' motion to modify or to remand (R. 343) was entered without opinion. The memorandum opinion granting the Board permission to file its petition to

vacate and to remand (R. 281) is not reported. The opinion affirming and enforcing the Board's order (R. 187-208) is reported in 119 F.(2d) 903. The findings of fact, conclusions of law and order of the Board (R. 25-180) are reported in 16 N.L.R.B. 727-882.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition was entered by the court below on April 19, 1944 (R. 311-312). The Board's petition for rehearing was denied on May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari was filed on August 11, 1944, and was granted October 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

THE QUESTIONS PRESENTED

1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during its compliance investigations that the unexecuted provisions of the decree must be modified in order to achieve the relief intended, and so represents to the court in a petition to vacate and remand, the court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

2. Does the existence of a verbal or mathematical mistake in the Board's formulation of the back pay remedy,

embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to "make whole" the 209 workmen concerned?

3. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the employment situation which would exist after the hearing and to base such back pay provisions upon hypothesis instead of proven fact. Irrespective of any other consideration, did the court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT OF THE CASE

On March 25, 1936, the International Union of Mine, Mill and Smelter Workers, Locals No. 15, 17, 107, 108, and 111, petitioners, hereafter called the International Union, filed with the National Labor Relations Board charges of unfair labor practices against the Eagle-Picher Lead Company and its wholly-owned subsidiary (R. 31), the Eagle-Picher Mining and Smelting Company, hereafter called the respondents. Hearings were stopped by injunction proceedings instituted by the respondents, but the injunction was later dissolved. *Eagle-Picher Lead Co., et al.* v. *Madden, et al*, 15 F. Supp. 407 (N.D. Okla.), reversed, 90 F.(2d) 321 (C.C.A. 10).

Upon an amended complaint dated November 8, 1937, hearings were held before a trial examiner from December

6, 1937 to April 29, 1938 (R. 26, 27). On October 27, 1939, upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 25-180). These may be summarized as follows:

During 1934 and early 1935 several attempts of the International Union to bargain collectively with the respondents had ended in failure (R. 39). On May 8, 1935, a strike was voted, closing virtually all mines, mills and smelters in the Tri-State District of Southwestern Missouri, Northeastern Oklahoma and Southeastern Kansas, including all operations of the respondents (R. 39).

The unfair labor practices. On May 25, 1935, operators and employees, mostly supervisory, including three foremen of the respondents (R. 40), started a back-to-work movement (R. 40-42). A new organization was formed to "stamp out" the International Union (R. 49). It was called the Tri-State Metal Mine & Smelter Workers Union, and was later known as the Blue Card Union of Zinc & Lead Mine, Mill and Smelter Workers. A mine operator, F. W. "Mike" Evans, was president.[1] The executive board consisted of mine foremen and superintendents. The constitution of the Tri-State (later Blue Card) Union required that executive board members have "at least 5 years experience as a vice-principal (ground boss or superintendent) in the metal mines or smelters in the Tri-State Area" (R. 43-44). Three supervisory employees of the respondents were on this board (R. 51). The funds of the Tri-State Union came from mining companies. The Eagle-Picher Companies, through George Potter, their vice-president, who was in charge of labor relations for both Companies (R. 33, 47, 86), made payments to the Tri-State Union of

[1] Evans was "closely connected financially and otherwise" with the respondents (R. 48). In 1935 he acquired a mining lease from the respondents, at no cost to himself, with a short-term cancellation clause, and during the years 1935, 1936 and 1937 his gross sales of crude ore to the respondents amounted to over $385,000 (R. 48).

$17,500, one of $2,500 on July 8, 1935, during the strike, and 3 days after the National Labor Relations Act came into force (R. 47, 50-51).

With those funds so disbursed by the respondents, the Tri-State Union commenced its organizational activities for the purpose of breaking the strike (R. 44). The Tri-State Union hired 75 to 100 men, furnished them with arms and other weapons, and had them patrol the district in "squad cars" to terrorize International Union members (R. 45, 48, 60-61). Some "rather top notch and notorious criminals," including "Missouri Criminal Number 1," were hired for this purpose (R. 60). At least $5,000 of the respondents' funds was expended for squad car activities (R. 48). These squad car men stopped International Union men, attacking, blackjacking, beating, kidnaping, and "jailing" them (R. 60-63, 107). The International Union hall at Treece, Kansas, was wrecked in a "pick-handle parade" and demonstration organized by supervisors of the respondents (R. 61-62). The respondents provided the participants with free liquor and furnished them with weapons for the pick-handle parades which resulted in widespread violence, brutality and lawlessness (R. 61-62).

The back-to-work movement succeeded and the respondents resumed operations on or about June 10, 1935, before the effective date of the Act, with the exception of the Galena smelter and the Big John mine, which did not reopen until July 16, 1935 (R. 93).

Representatives of the International Unions held conferences with Vice-President Potter after July 5, 1935, seeking a settlement of the strike and a return of their members to work. These conferences with Potter failed (R. 110). A substantial number of International Union members individually sought reemployment. They were refused by the respondents because they would not give

up their memberships in the International Union and join the Tri-State Union (R. 89, 93, 110). The Board found that 209 International Union members, hereafter called claimants, were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions (R. 110).

The respondents' consistent policy in their campaign to break the International Union was to deny employment to active International Union members and to impose upon them as an illegal condition of employment membership in the Tri-State (Blue Card) Union (R. 92). Indeed, Vice-President Potter's instructions from the home office in Cincinnati were to force the employees to join the Tri-State Union (R. 84, *et seq.*). Moreover, all applicants for membership in the Tri-State Union had to be recommended either by their former employer or by some member of the executive board (R. 54). As stated, this board was composed solely of supervisory employees of the respondents and other mine operators. Refusal to obtain such a recommendation for membership in the Tri-State Union was equivalent to a blacklist. The respondents thus used the Tri-State (Blue Card) Union as an employment agency by passing upon and substantially controlling its membership; by the policies of this union the respondents effectively excluded all workers suspected of sympathies for the International Union (R. 55, 92, 93).

The Board "found that the respondents, and each of them, have participated in, contributed to, encouraged, authorized, and ratified acts of violence against the International and its members" and ordered the respondents "to cease and desist therefrom" (R. 129).

It further found that the imposition upon International Union members of the above-described conditions of reinstatement on and after July 5, 1935, constituted mass

discrimination by the respondents against their employees in violation of Sections 8 (1) and (3) of the Act (R. 131-134, 166). All of these practices, though initiated prior to the passage of the Act, were persisted in after the passage of the Act (R. 95).

The back pay order and decree. The Board determined that in order to effectuate the policies of the Act the 209 claimants discriminated against should receive reimbursement for their lost wages. In fashioning a back pay remedy, the Board stated that its objective was "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132). The Board declared that it sought to make the claimants whole with back pay (R. 132). The Board stated, however, "the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo" (R. 132). These difficulties were created by the respondents' claim that there were fewer jobs available for the claimants because other old employees had successfully reapplied for work after July 5, 1935, as well as by their contention that the curtailment of their operations following the strike had left an insufficient number of jobs available for claimants and other old employees reapplying after July 5, 1935, the effective date of the Act (R. 132, 100-103, 29 n. 6, 18-21, 23, 6-9, 17). In particular, the respondents made the following specific representations:

That the number of men needed in their operations after the strike was greatly reduced (1) by invalidation of the N.R.A. (R. 10-11, 100-101, 186),* (2) by sale and shutdown of some of their mines (R. 11-14, 16, 186), (3) by changes in methods of operation (R. 10, 12, 14-16), (4) by elimination of specific jobs (R. 14, 15, 186).

*The respondents claimed that this consideration alone reduced their personnel requirements by "more than 2/7ths" of the 1100 men on their staffs prior to the strike (R. 10-11).

In a further attempt to delimit the area of job opportunities for the claimants the respondents insisted that not only were they taking back old employees predominantly, but also that as their old employees reapplied those few new men who were on their pay rolls were rapidly eliminated (R. 17-18). Implementing this claim, the respondents contended that of the crew of men working after the strike, over 90 percent were on the pre-strike pay rolls of May 8, 1935 (R. 9). The respondents persisted in the above-described defenses after the issuance of the trial examiner's intermediate report, on the ground that as to each claimant the report "ignores * * * that there is no evidence that said person's former employment or any employment with the respondents or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations"; and, furthermore, that such report "ignores the evidence of respondents' requirements and availability of work" (R. 18-21, 219, 100-103, 132; Exceptions to Intermediate Report, Nos. 119, 120, 121, 123, 124, R. 18-21). Finally, in order to show that the condition of severely contracted employment and job opportunities was lasting and would continue, the respondents represented as late as December 13, 1938, after the hearing, that "Mines are closing daily." (R. 22).

These representations both with respect to the curtailed employment situation as well as to the respondents' practice in restaffing their operations with old employees, led the Board to abandon its normal administrative formula for computing back pay, for it credited respondents' representations with respect to the availability of employment after July 5, 1935. Thus the Board stated (R. 132):

> * * * had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have re-

> turned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of claimants discriminated against would have returned, but here again, we cannot tell which ones.

And it likewise assumed that the respondents' hiring practices were as represented, for it pointed out (R. 134 n. 186) that

> we make the normal assumption, based here on the respondents' actual practice, that the respondents would generally have taken back those employed by them prior to the strike, in preference to new applicants, had they acted without regard to illegal considerations.

The lump-sum formula. The Board's assumption that there were not enough jobs available for all claimants and other old employees desiring to return after the strike and after July 5, 1935, rendered its normal remedy of full back pay to each individual worker discriminated against inapplicable, for the normal remedy might well have resulted, upon the facts then understood by the Board, in imposing upon the employer a larger back pay obligation than the losses actually sustained by the workers. In order to free the employer from the possibility of such an excess liability, the Board abandoned its customary remedy and accommodated its relief to the employer's pleas. In so doing it was faced with two difficulties:

The first difficulty was that there was no way of determining which of the 209 claimants would have found reemployment absent discrimination, and, therefore, which of them should be granted back pay.* The Board sought to overcome this difficulty by apportioning the presump-

*This inference follows inescapably from the Board's assumption that there were at all times after the date of discrimination fewer jobs open than old employees available (R. 132). Directly after the date of the discrimination, July 5, 1935, the Board was confronted with the following employment situation:

tive total of earnings of so many of the claimants as would have obtained jobs after July 5, 1935, among all of the claimants as a group. The second difficulty was the ascertainment of this total sum to be distributed. To solve the second difficulty, the Board devised a "lump-sum formula" for the first time in its experience. *Fifth Annual Report*, National Labor Relations Board (Gov't Printing Office, 1940), p. 74. Since most of the jobs opening up did not require special skills or abilities, the Board assumed that the claimants, absent discrimination, would have shared in such jobs as opened up proportionately with other old employees reapplying for work, hereafter called reapplicants (R. 100, 101, 102, 132). Under the formula the lump sum therefore consisted of the total earnings from all jobs opening up at the respondents after July 5, 1935 (R. 133). It was provided that a portion of such lump sum was to be distributed to the claimants as a group according to a "governing proportion" (R. 134), namely, in the ratio of their number to the same number plus the number of all other old employees reapplying for jobs on

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Prior to the strike, the respondents' complement of men amounted to (R. 94, n. 120)		1100
On July 5, 1935, old and new employees on their pay rolls amounted to (R. 94, line, 3)	595	
Of this group new men numbered (R. 98)	154	
So that on July 5, 1935, old employees numbered		441
And old employees not on the July 5, 1935, pay rolls totalled		659

Because of the respondents' representations as to their employment requirements and fixed hiring practices, the Board projected this perspective throughout the entire period of discrimination, and assumed that at no time could the respondents' normal practices yield jobs for all the claimants and other old employees. As has been shown, this assumption flowed directly from the respondents' evidence and representations.

and after July 5, 1935 (R. 132-134).* This solved the second difficulty.

Both difficulties originate from the one fact assumed by the Board that there were and would continue to be at all times less jobs open than old employees available. By the one means of devising its lump-sum formula, the Board sought to and did overcome both difficulties in principle (R. 132-134, 317, 332-333). In short, that part of the formula so far considered reimburses fully, or "makes whole" (R. 169, 171, 210, 212), the 209 claimants collectively for all wage losses incurred by them as a group, a remedy invoked solely by reason of the respondents' evi-

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*The main provisions of the formula are as follows:

"A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against.' The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents's pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935. Let us assume for purposes of illustration that the lump sum amounts to $360,000, that there are 200 claimants discriminated against, and there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or $240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated aganst." (R. 133-134; 16 N.L.R.B. 835-836.)

dence and representation of job insufficiency on and after the effective date of the Act.

Had the record disclosed a perspective of full employment, the Board indicated that it would have written into its order the normal back pay remedy without resort to a formula (R. 132, 222-227, 337). Just as the Board framed the formula itself in order to reduce the scope of the employer's back pay liability to the shape of the record as it then saw it, so it further sought to prevent overpayment of back pay by adding to the formula, itself addressed to a situation of reduced employment, a proviso in footnote 185 which became operative at these points during the period of discrimination when the assumed situation might be varied by employment peaks rising above the level necessary to provide jobs for both all the claimants and reapplicants. Footnote 185 provides:

> If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum. (R. 133.)

Thus the Board carefully sought to protect the employer from overpayment in two ways.

But this footnote, through a verbal or mathematical error in its formulation failed to give effect to its plain intention and the intention of the entire formula of confining the back pay to the actual wage losses of the claimants. It directs that the claimants and other old employees reapplying for jobs, share proportionately in the

proceeds of such jobs as would have gone to the claimants alone, instead of to the claimants and such other old employees.* Thus, the footnote omits a necessary element to its correct formulation. The Solicitor General, on behalf of the Board, suggests that "correctly worded so as to achieve the Board's objective, footnote 185 should read:

> If at any given time during this period the number of new or reinstated employees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum." (Bd.'s mem. pp. 11-12.)

As a result of the omission of the words italicized above, in a situation of full available employment for all 209 claimants and all other old employees reapplying after July 5, 1935, the application of footnote 185 would allow reimbursement to the claimants of only a part or fraction of the wages they lost, contrary to the purposes the Board stated it sought to achieve by its order (R. 132, 334-336).

In addition, even if footnote 185 were correctly worded, the entire formula would nonetheless be unsuited to the ordinary full employment situation, since it harbors other errors, mistakes or ambiguities likely to lead to endless litigation (Cf. Bd.'s Mem. pp. 12-13 n. 3, 23 n. 7).

Pursuant to its conclusions, the Board ordered the respondents, among other relief not material here, to offer the 209 claimants reinstatement or placement on a preferential hiring list, and to "make whole" these employees with back pay (R. 169, 171). In accordance with the Board's established practice, no specific amounts of back pay were fixed in the order (See, *Fifth Annual Report*, p.

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*For detailed analysis of the mistake in footnote 185, see R. 334-337.

128, *supra*). Paragraphs 2 (d) and 3 (b) of the back pay order provide merely that the respondents—

> Make whole all persons listed in Appendix A [and B] in the manner set forth above in the section entitled "The Remedy", * * *. (R. 169, 171.)

On June 27, 1941, after the usual proceedings for review and enforcement instituted on November 6, 1939 (See Chronology, had been pursued, the court below entered a decree (R. 187-208) affirming and enforcing the Board's order in its entirety (119 F.(2d) 903), with modifications requested by the Board "largely formal in character" (R. 208-212). Judge Sanborn, who presided, and who wrote the opinion for the majority, dissented in part as to the back pay order (R. 205-206).*

On August 23, 1941, the respondents, in accordance with the order enforced by the decree, offered reinstatement to the claimants, excepting James Curry † (R. 224 n. 7), thereby fixing August 23, 1941, as the terminal date of the 6-year period of discrimination which had begun July 5, 1935 (R. 224, 338).

The Board then requested the respondents to comply with the back pay provisions of the decree, and to furnish the Board with the basis of their computations. (R. 224). On or about May 1, 1942, the respondents made their computations [consisting of a written audit dated February 25, 1942] available to the Board (R. 225). At the same time

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* Judge Sanborn expressed the view that since some of the claimants had not reapplied for work after the strike, there was no showing that they were willing to return to work; and for this reason were not entitled to back pay. A majority of the court held otherwise (R. 204). The Board specifically found that the claimants were willing to return to work (R. 110), and further, that reapplication was a useless gesture in view of the respondents' policy of excluding all International Union members (R. 98). The charges of unfair labor practices filed by petitioners on behalf of the claimants conclusively established the claimants' willingness to return to work, absent illegal conditions of employment.

† See below, page 46, n. 36.

they tendered the sum of $8,409.39, the amount computed under the audit, in purported full payment of all wages lost by the 209 claimants during the 6-year period of discrimination (R. 225). Later, the respondents asserted that no more than $5,400 was due and owing to the claimants under the formula as they interpreted it (R. 225).

Discovery of the true employment situation. The Board thereupon undertook an examination and analysis of the pay rolls and records of the respondents to verify the accuracy of their audit and tender, as is its usual practice (R. 225). These payrolls and records, of course, were not a part of the record in the court below or in the proceedings before the Board. The Board's investigations and analysis required the services of numerous members of its staff for a period of several months (R. 225, 338). In the Board's own words, "it disclosed the fact, not heretofore made known," that " * * * despite any curtailment of employment, the Companies, in their operations conducted after July 5, 1935, and during the entire period up to and including August 23, 1941, were in a position to accord full employment at all times both to all reapplicants continuing to be available for work, and to all claimants" (R. 225, 301, 338),* and further, that "the Companies had been continuously employing a total number of new employees equal to and at times substantially in excess of the total number of claimants and available reapplicants and had paid wages to said new employees in a sum equal to and at times in excess of the aggregate amount which they normally would have paid to the claimants and available reapplicants" (R. 225-226).

* "With the exception that the Mining Company, at its Tri-State mines during the week ending September 10, 1936, and at its smelter located in Galena, Kansas, during 33 isolated weeks in the period from July 5, 1935, to August 23, 1941, was in a position to employ on the average at least 95 percent (instead of 100 percent) of the total number of claimants and available reapplicants" (R. 225, n. 8).

The respondents' evidence that most of the new men were eliminated in a short period of time (R. 17-18) was untrue (R. 225-226). Its evidence that of the crew of men working after the strike, over 90 percent were on the pre-strike pay rolls of May 8, 1935 (R. 9) was false (R. 225-226, 268-280). The respondents' representation that after July 5, 1935, jobs were not available for the claimants (R. 18-21, 100-103, 132) was untrue (R. 225, 268-280).

The Board's petition to remand. Upon the basis of this evidence establishing the true employment situation, the Board on February 1, 1943, filed its petition to vacate the back pay provisions of the decree affecting the 209 claimants, and to remand so much of the case as was affected by such provisions (R. 215-230). Accompanying the petition the Board filed, in an Appendix, its verified (R. 230, 226) compilations disclosing the employment situation as it actually existed and developed (R. 268-280). The Board's petition to remand was premised on these principle considerations: (1) that it had granted back pay to the 209 claimants upon the assumption that there were at all times after July 5, 1935, less jobs open than old employees available (R. 221); (2) that solely for this reason the Board departed from its normal remedy and granted back pay to the claimants as a group to be computed under the lump sum formula (R. 222; *supra*, p. 9); (3) that contrary to its previous assumptions (R. 132), the true employment situation that existed was one in which all claimants and all other old employees seeking employment after July 5, 1935, would have been rehired had the respondents acted lawfully (R. 222, 225-226); and, further, (4) that—

> * * * in the fulfillment of the statutory purpose to make whole each employee who had suffered wage deprivation in consequence of the Companies' said unfair labor practices, the Companies properly should have been required to reimburse fully each such employee. However, the Board's remedy, as applied to the actual situation now dis-

> covered, requires the Companies to make good to each only a fractional portion of his loss. Hence, as a direct consequence of and in reliance upon the Companies' representation and contention, the Board had been moved to enforce, a remedy which, under the actual facts now appearing, is grossly inequitable to those who had suffered deprivation of earnings in consequence of the Companies' unfair labor practices. (R. 226-227.)

The Board concluded that the lump sum remedy "however interpreted," would substantially shift the loss of wages resulting from the respondents' discrimination to the claimants. The Board further alleged that the back pay remedy as it now stands would relieve the respondents of a major part of their obligation "measured by the actual facts," and "thereby frustrating the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded" (R. 228). The Board therefore requested that paragraphs 2 (d) and 3 (b) of the decree (R. 210, 212) awarding back pay under the formula be vacated and that part of the case remanded to permit the Board "for the first time" to consider the "actual facts in order to prescribe a remedy appropriate to the true conditions" (R. 229).

The Board estimated that the full wages lost by the claimants, after deducting net earnings elsewhere, would amount to about $800,000, or roughly $3,830, on the average, for each claimant for the entire 6-year period of discrimination (R. 227, 302-303, 339).

On August 9, 1943, 6 months after the Board had requested permission to file its petition for remand, the court granted the Board leave to file its petition stating that it would treat the petition "in the nature of a bill of review" (R. 281).

The respondents' answer to the Board's petition (R. 283-290), although challenging its sufficiency, admitted the

truth of the following crucial fact, to-wit: that they had jobs on and after July 5, 1935, for all 209 claimants plus all other old employees available (R. 288, 295, 301, 305-306).* The respondents' admission of this fact caused the Board to move for judgment on the pleadings and the record on the ground that no genuine issue of fact was now in dispute (R. 293-304, 308).

On April 19, 1944, the court below rendered its decision (141 F.(2d) 843), denying the Board's motion for judgment and dismissing its petition to remand (R. 307-311, 312). On May 4, 1944, the Board filed its petition for rehearing (R. 313-324).

On May 11, 1944, the petitioners filed their motion for modification or remand of the back pay provisions of the Board's order enforced by the decree relating to the 209 claimants (R. 329-342). The motion was predicated upon the following grounds: (1) that the Board had made a mistake in setting up its lump-sum formula by leaving out of the footnote 185 an essential element (R. 341, 334-336), pointed out above (*supra*, pp. 12-13); (2) that the employment situation following the close of the hearing on April 29, 1938, had turned out to be otherwise than as pognosticated or assumed by the Board (R. 340); and (3) that the Board's discovery of the true employment situation outlined above, disclosed a factual situation for which the Board had made no provision (R. 337).

On May 17, 1944, the court below granted petitioners leave to file their motion to remand (R. 326). On the

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* In its motion for judgment, the Board averred:

"Furthermore, in the brief which they [the respondents] have incorporated in their answer (A. III (13)), they confirmed the admission, which they made in open court on February 27, 1943, in response to an inquiry from Judge Woodrough, that during the discrimination period they were in a position to accord full employment to all claimants and all reapplicants (Co. Br. 4-5, 26, 27, 33, 34, 40, 49, 59), and even declared (contrary to what the record shows) that they *fully conceded* this circumstance upon the original Board hearing (Co. Br. 5-6, 39, 40, 50)" (R. 301).

same day, the court denied petitioners' motion to remand and the Board's petition for rehearing, both without opinion (R. 343).

The Decision of the Court Below

The court below treated the Board's petition to remand as "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" the unexecuted back-pay provisions of the decree enforcing the Board's order (R. 307). It affirmed its "jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted" (R. 311). From this it follows that in principle the court below recognized the right to modification of a Board order that has been affirmed in a decree. However, the court stated that it was "not persuaded that the Board departed from the form of order by which 'it ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as the composition of the staff of workmen" (R. 309). It declared that there were "other difficulties" than job insufficiency which caused the Board to depart from its usual back pay remedy and to devise a lump-sum formula (R. 310). It stated that the formula "covers the events of a larger or smaller role of workmen" [*] (R. 309), and that "it is apparent on the face of it that it does not accord to each individual workman in the group an amount of back pay

[*] The court's opinion reads:

"The Board's formula makes provision for the computations concerning back pay for the group of 209 men in the case that the number of persons newly employed or reinstated after July 5, 1935, is less than, as well as in the case that it exceeds the number who are to be compensated under the order, and so it covers the events of a larger or smaller role of workmen" (R. 309-310).

equal to a full wage from July 5, 1935, to the date of offer of reinstatement, and that it specifically provides a fraction only of such full wage" (R. 310). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the Companies" (R. 310). The court further stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 311).

The court's decision, in its effects, forecloses all further administrative action with respect to the back pay remedy. The Board is left to apply a remedy which it has declared will not effectuate the policies of the Act (R. 228, 229). The 209 claimants have not received any reimbursement of their lost wages, and the back pay provisions remain unexecuted (R. 339-340, 311).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that it was "not convinced that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved," and thus assuming original authority to determine what remedy will bring about fair administration of the Act.

2. In refusing to remand the back pay provisions of the decree and thereby assuming original jurisdiction over the fixing of the specific amounts of wages lost and back pay to be awarded.

3. In refusing to permit modification or remand of the back pay provisions for the discrimination period follow-

ing the close of the hearing before the trial examiner so as to accord with the Board's intent as expressed in its order.

4. In refusing to permit the Board to correct its mistake in formulating footnote 185.

5. In holding that the Board departed from its normal remedy for reasons other than its understanding as to the employment situation.

6. In holding that the Board intended to award partial back pay where full wages were lost by the entire group of claimants.

7. In holding that paragraphs 2 (d) and 3 (b) of the decree should not be modified, or vacated and remanded.

SUMMARY OF THE ARGUMENT

The decision of the court below stands as a barrier against the Board completing its administrative functions. The authority of the Board does not end with the entry of an enforcing decree, because the continuing nature of the administrative process necessitates the Board's continuing supervision over the remedy prescribed to achieve the Congressional policies. Particularly where, as here, the order for back pay is general, the Board must fix the back pay at some stage of the proceeding as an original tribunal and not as the surrogate of the court, and the order enforced by the decree must be freed of ambiguities and mistakes before contempt proceedings are brought.

In dealing with unfair labor practices under the National Labor Relations Act the courts are limited to specific functions, which do not include the choosing or fashioning of remedies before enforcement, nor the determination whether after enforcement the relief prescribed will achieve the results intended. Only the Board is the proper tribunal to make such a determination. This is a

principle basic to the administrative process, as the Circuit Court of Appeals for the Fourth Circuit held in *American Chain & Cable Company v. Federal Trade Commission*, 142 F.(2d) 909. "To hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement." Nor is there danger that the decree of the court may be flouted by a modification undertaken by the administrative agency, because any such modification would then be subject to review by the court. An advantage of this ruling is that the modified order comes to the court after full investigation and hearing and after the agency has exercised its administrative competence. In addition, to permit the issues to be litigated on a motion to remand entails unnecessary delays. It places the court in a position where it has to determine matters administrative in character at a time when the evidence is incomplete and the Board has not yet determined the relief suitable to the changed conditions.

The factors governing revision of administrative orders are not those controlling the reopening of common law judgments and equity decrees. The decision below laminates onto the flexible administrative process a rigid bill of review procedure involving issues wholly extrinsic to the Act, and assumes that administrative competence somehow fails to survive a term of court. The relevant consideration for revision of a Board order enforced by a decree is effectuation of the policies of the Act. No more after enforcement than before should courts substitute their judgment for that of the Board as to the efficacy of a particular remedy, and thus prevent the exercise of the Board's expert judgment at precisely the point where it should command the greatest deference.

The circumstances of the instant case warrant administrative reconsideration of the back pay remedy. The as-

sumptions upon which the Board predicated its special lump-sum formula were false. Besides, the formula contains a mistake in its formulation, which, as admitted by the Solicitor General on behalf of the Board, defeats the Board's expressed intent. Furthermore, the court below improperly construed the Board's order as well as its own prior decision enforcing it. The court's reinterpretation of the Board's remedy results in a retrospective reversal of the relationship between court and agency. Finally, the court failed to consider other relevant factors in the case. It disregarded the fact that the claimants are required to give up 75 percent to 99 percent of the wages they lost on account of respondents' unfair labor practices, contrary to the expressed intent of the Board to "make whole" the claimants for such losses, an untenable result, particularly in view of the backgound of the case and of the peculiar situation which developed after nine years of delay in attaining the objectives of the Act.

Irrespective of any other consideration, the remedy became inapplicable by reason of changed circumstances for the period of discrimination following the close of the hearing before the trial examiner. Here the remedy was prospective in character and based upon hypothesis and assumption instead of proven fact. Such a continuing or prospective back pay remedy is subject to revision when subsequent developments reveal that it fails to achieve the results intended by the Board.

ARGUMENT

I.

THE COURT BELOW ERRED IN FORECLOSING THE NATIONAL LABOR RELATIONS BOARD FROM TAKING FURTHER ADMINISTRATIVE ACTION WITH REGARD TO UNEXECUTED BACK PAY PROVISIONS OF THE DECREE.

In October, 1939, the National Labor Relations Board entered a decision which unequivocally found the respondents guilty of unfair labor practices, and, in addition to other relief not here material, ordered them to make the 209 claimants whole for wage losses suffered on account of these unfair labor practices. In June, 1941, the court below affirmed and enforced this order. The present proceeding concerns the procedures to be followed in executing this order. It arises from the fact ascertained by the Board during compliance investigations that the remedy does not achieve the results intended (R. 228).

The Board, instead of acting on its own authority and making the necessary corrections and adjustments, which are a part of its administrative functions, applied to the court below for permission to do so. The court, instead of holding that the Board had authority to take further administrative action without first obtaining its permission, in its turn, treated the Board's request as one in the nature of a bill of review, and applying common law or equity standards, held that it was "not convinced upon the showing in these proceedings that * * * perversion of justice or unfair administration of the Act had been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311).

The decision of the court below stands as an injunction against the Board taking further administrative action necessary to effectuate the policies of the Act. Thus the court below and the Board together have contrived to

erect a barrier in the way of disposition of this case. What to petitioners seems to be essentially a simple situation has become an involved question of law. Solution of the controversy depends, we believe, upon the answers to the following questions:

1. Which is the proper tribunal to decide whether further administrative action is necessary?

2. What are the relevant considerations?

3. What are the merits of the case?

No explicit answers can be found in the National Labor Relations Act or in the decisions of this Court. It will be necessary, therefore, broadly to consider the issues involved.

A. *The Board is the Proper Tribunal to Decide Whether After Enforcement Further Administrative Action is Necessary.*

1. *The authority of the Board does not terminate with the entry of a judicial decree.*

Several provisions of the National Labor Relations Act charge the Board with functions which continue after entry of a decree enforcing its order. Section 10 (c), which authorizes the Board to enter an order granting relief, specifies that "such order may further require such person to make reports from time to time showing the extent to which it has complied with the order", thus explicitly providing for post-decree action by the Board. Other provisions of the Act implicitly recognize the Board's authority to function after entry of an enforcing decree. For example, under Section 5 "The Board may prosecute any inquiry necessary to its functions in any part of the United States". Both the powers of the Board concerning representation of employees and elections under Section 9 and concerning prevention of unfair labor practices under Section 10 are unlimited in time. The powers of the

Board conferred in Section 11 to conduct such investigations and hearings which, "in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10", are not restricted to any particular stage of the proceedings.

A consideration of the deeper issues involved supports this reading of the Act. The administrative process is not merely a new method of dealing with old problems. Industrial development has forced upon us the need for "government to maintain a continuing concern with and control over the economic forces which affect the life of the community".[11] Government now takes active steps to control human relations and to manage the material resources of the nation. It no longer simply umpires private controversies.

These undertakings of government are characterized by a trend towards preventive legislation which increasingly supplants action designed merely to correct evils after they have occurred.[12] Administrative action looks to the future. It is particularly relevant to stress this distinguishing characteristic in the case of administrative adjudications. On its face a back pay order of the National Labor Relations Board looks much like a common law judgment for money damages. But a common law judgment is limited in its scope to the interests of private liti-

[11] Landis, The Administrative Process (1938), p. 8. Cf. S. Rep. No. 8, 77th Congress, 1st Session, Chapt. 1, Attorney General's Report on Administrative Procedure in Government Agencies.

[12] Cf. Phelps Dodge Corporation v. National Labor Relations Board, 313 U. S. 177, 193; Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533; National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 364-365; Waterman Steamship Co. v. National Labor Relations Board, 309 U. S. 206; Corning Glass Works v. National Labor Relations Board, 129 F. (2d) 967, (C.C.A. 2); National Labor Relations Board v. Waumbec Mills, Inc., 114 F. (2d) 226, (C.C.A. 1); National Labor Relations Board v. Killoren, 122 F. (2d) 609, (C.C.A. 8), cert. den. 314 U. S. 696.

gants and it merely corrects the consequences of their past conduct. The granting of back pay, however, creates no private rights and the parties are incidental only. The remedy, rather, is a means of achieving a larger objective —industrial peace. It is designed primarily for its effect upon the future; it seeks to create in employees the confidence that the exercise of their right to self-organization, declared important as a matter of public policy, will be effectively protected (Section 1, 7 and 8 of the Act).

The continuing nature of the administrative process is reflected in the practice and experience of the National Labor Relations Board. Since industrial relations are not static, but are dynamic and changing, they require continuing supervision. Adequate handling of the problems necessitates flexible and expeditious action foreign to the judicial process. While judicial procedure traditionally leaves enforcement to private initiative, the Board must maintain a special compliance division. In this sphere many novel problems arise with which the Board must deal on its own initiative if the objectives of the Act are to be achieved. Laborious investigations by the Board's staff [18] and by its regional offices often begin only after their objectives have been defined in an enforced order. In these post-decree procedures the Board's technical knowledge and familiarity with the subject matter comes into full play. It is then that the practical consequences of an order and decree, often worded in general terms, are evaluated.

Other technical considerations and difficulties are often involved in making record and payroll analyses for the

[18] The Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, supra, page 18, states: "The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to perform. Each is charged by Congress with the work of *continuing supervision* of some field of activity throughout" (Italics ours).

purpose of reinstatement and the computation of the back pay due." The Board in its petition to remand in the instant case noted that after entry of the decree numerous members of its staff had been employed for several months in checking respondents' audit and back pay computations involving thousands of employees for a six-year period (R 225). Part of this work is reflected in the tables contained in the Appendix filed by the Board as a part of its motion to remand (R. 268-280). In the post-decree work of fixing the specific back pay due, many terms of the enforced order require expert interpretation and application, for instance, the ascertainment of "net interim earnings". In addition to the usual problems, the formula in the case at bar creates further difficulties. How shall the "average earnings of a new or reinstated employee" (R. 133, n. 185) be computed? Shall the earnings of new or reinstated employees who worked but one day a week, or on some other part-time basis, be included in a daily, weekly, monthly, annual or six-year average? Shall there be one governing proportion (R. 134) computed on the basis of the actual number of claimants and reapplicants over the whole six-year period or by the number of claimants and reapplicants from day to day, week to week, or on some other basis? Shall there be a separate governing proportion for each day, week or month, computed on the basis of the actual number of reapplicants rather than of the average number? Does the governing proportion change when a reapplicant leaves his job? The

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" Illustrative of the difficulties involved, the Board in its *Fifth Annual Report* (Gov't Printing Office, 1940), pp. 128-129, refers to the *Stackpole Carbon Company* case, 105 F. (2d) 167, cert. den. 308 U. S. 605, where a fluctuating employment situation existed, and the *Carlisle Lumber Company* case, 99 F. (2d) 533, where a deferred payment plan was devised because of inability of the company to meet the back pay order.

determination of such questions, it is clear, "belongs to the usual administrative routine of the Board".[11]

The Circuit Courts of Appeals for the Second, Fifth and Sixth Circuits have ruled that the Board itself should determine the specific amounts due under a general back pay order which, like that in the instant case, does not fix the back pay due. Such orders were held to be "interlocutory" only.[12] The court below, by preventing the Board from taking further action, thereby necessarily precluded the Board from independently fixing the specific amounts of back pay to be awarded. In this respect the court below assumed original jurisdiction. But the fixing of the specific amounts of back pay is a post-decree function which the Board alone has the facilities and expertness to undertake.

"At some stage of the proceeding", said Judge Learned Hand in the *New York Merchandise Company* case, "the Board must therefore fix it [the back pay] as an original tribunal and not as the surrogate of the court", or else confusion will arise with "consequences which we think have not been fully realized" (p. 951). Some of the consequences of substituting judicial for administrative post-decree action were envisioned by Judge Clark of the Circuit Court of Appeals for the Second Circuit when he observed: "Experience, I think, now shows that there is serious question as to the wisdom of committing the last and perhaps most delicate step of labor law enforcement—proceedings in contempt—to somewhat alien professional interests as in effect a court of first instance. * * * We lose the very quality of expertness and exercise of wise dis-

[11] National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 130.

[12] N.L.R.B. v. New York Merchandise Co., 134 F. (2d) 949, 952 (C.C.A. 2); Agwilines, Inc., v. N.L.R.B., 87 F. (2d) 146, 150 (C.C.A. 5); N.L.R.B. v. Newberry Lumber and Chem. Co., 123 F. (2d) 831, 839 (C.C.A. 6).

cretion in difficult and troubled situations which is the essential basis for commital of such matters to agency control. * * * Moreover, the long wait while the new tribunal is familiarizing itself with the law and the facts—here delaying settlement of an active labor dispute for a year after seeming agreement, though the underlying facts were substantially undisputed—underlines perhaps the chief problem of administrative procedure, that of delay in effective action. I suggest that the taking of testimony for our consideration on these proceedings should be had promptly through the trained examining staff of the Board itself; * * *." *National Labor Relations Board v. Giannasca*, 119 F.(2d) 756, 759."

A further difficulty was noted by Judge Hand in the *New York Merchandise Company* case, when he stated that "until such hearing has been had and a decision rendered fixing the amount [of the back pay], the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for disobedience of an order which does not definitely prescribe what he is to do" (p. 952)."

In order that a labor board proceeding be completed, it is imperative that the Board retain authority to exercise its administrative competence and judgment in fixing the specific amounts of back pay due. Nor is a contempt proceeding the appropriate place to determine other matters just as basic to the nature and scope of the decree as the specific amounts of back pay due. Such matters as the meaning of the Board's order, its assumptions and theory, are improperly deferred to the contempt stage of the pro-

" Cf. Corning Glass Works v. National Labor Relations Board, supra, pp. 971-973; National Labor Relations Board v. Remington Rand, Inc., 130 F. (2d) 919, 937 (C.C.A. 2).

" In the Phelps Dodge Corporation case, supra, p. 200, it was remarked that back pay matters "should not be left for final settlement in contempt proceedings."

ceeding for clarification. To hold otherwise would be not only to sacrifice the administrative competence of the Board in an area in which it speaks with authority, but also to impose upon the courts the serious handicaps of resolving essentially administrative issues in an environment alien to their effective handling, and upon employers the burden of contempt when a decree has not been freed of ambiguities.

2. In dealing with unfair labor practices under the National Labor Relations Act the courts are limited to specific functions.

Congress has entrusted the courts with an important role in the administrative process. For reasons based in tradition, it has often refused to grant administrative agencies the power to enforce their rulings by sanctions issued under their own authority.[9] The Board, for example, must rely upon the Circuit Courts of Appeals for enforcement of its orders. Section 10 (c). Here, the courts assume a new function; one which "is only a phase of a single unified process".[10] In addition, the courts serve as "a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private rights".[11] But, the courts exhaust their *limiting*[12] authority when they ascertain that the administrative agency has stayed within the boundaries of its allotted domain, has fulfilled the constitutional require-

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[9] Cf. Landis, supra, Chapter III.

[10] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 141. Cf. United States v. Morgan, et al, 307 U. S. 183, 189.

[11] Cf. S. Rep. No. 573, 74th Congress, 1st Session, p. 15; H. Rep. No. 1147, 74th Congress, 1st Session, pp. 23-24; National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 342.

[12] The expression "limited review", coined in the Phelps Dodge Corporation case, characterizes the scope of the court's function (313 U. S. at p. 194). From a functional point of view, it is a "limiting review". The restraint characterized in the one expression is upon the courts; in the other, upon the administrative agency.

ments of procedure, and has lived up to minimum standards of fairness." In exercising this authority courts must guard against usurping functions administrative in character. The principles which gui e the judiciary in their action as part of the unified process are summarized by the phrase "judicial restraint".["]

The fashioning of remedies is peculiarly a matter of administrative competence, for it is to the administrative agencies alone that Congress has entrusted the determination of matters of policy.["] Even when the Board transgresses its domain, the court has no authority to fashion and substitute a remedy it deems appropriate. The court can only refuse to enforce or remand.["] At no time does the administrative power to fashion a remedy pass to the court, not even when the remedy is embodied in a court decree. Nor does a decree entered by a court have a continuing effect so as to narrow further administrative action. This was held in the case of *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134. There the Commission denied an application by the company for a permit to construct a broadcasting station. On appeal the decision was reversed and the case remanded to the Commission because the Commission had applied an erroneous rule of law. In the proceedings after remand, the Commission considered circumstances which arose after the original hearing, namely, the applications of other companies for the permit. The company sought to foreclose consideration of these new factors by petitioning for a writ of mandamus. The Circuit Court of Ap-

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["] Cf. National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 271; National Labor Relations Board v. Falk Corporation, 308 U. S. 453, 461; International Ass'n of Machinists, etc., v. National Labor Relations Board, 311 U. S. 72, 82.

["] S. Rep. No. 8, 77th Congress, 1st Session, p. 90; Levin, *Mr. Justice William Johnson and the Unenviable Dilemma*, 42 Mich. L. Rev. (1944) 803.

["] Phelps Dodge Corporation, supra, p. 194.

peals granted the writ. This Court reversed the decision and held that after remand "the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest or necessity'" and that "all matters of administrative discretion remain open for determination on remand after reversal" (p. 146).[11]

Courts and administrative agencies both are vital forces in the armory of government. The common aim set for both is attainable only by cooperative effort. Both have every reason to increase confidence in the administration of justice jointly entrusted to them. Courts should hesitate to undermine this confidence by an *a priori* distrust of the Board, or to formulate rules based on such *a priori* distrust—a practice engaged in by many critics who, under the guise of comment on the methods and procedures of administrative agencies, hide their hostility to the policies which these agencies have been appointed to further.[12]

3. The National Labor Relations Board is the proper tribunal to decide whether an order embodied in a decree will adequately effectuate the policies of the Act.

All practical considerations which have led Congress to entrust fact-finding and policy to the Board are present equally after enforcement as before. The court does not acquire, simply by enforcing an order, the special experience and familiarity with the problems which the Board possesses. The laborious and technical investigations necessary before it can be determined that the decree will not effectuate the policies of the Act can be performed only by the Board. Since all matters of relief are closely related to the question of policy, they are administrative in character and belong to the Board.

These principles were recognized by the Circuit Court of Appeals for the Fourth Circuit in its decision in *Ameri-*

[11] Cf. El Moro Cigar Co. v. Federal Trade Commission, 107 F. (2d) 429, 432 (C.C.A. 4).

[12] Gellhorn, *Administrative Law: Cases and Comments* (1940), p. 5.

can Chain and Cable Company, Inc., v. Federal Trade Commission, 142 F.(2d) 909, decided May 29, 1944. In that case the company, on account of the war, applied for a stay of enforcement of a cease and desist order of the Federal Trade Commission which had been affirmed by the court (139 F.(2d) 622). In an opinion by Judge Parker, the court held that it had no power to stay or modify its decree because the Commission had not first modified its order "since the decree is based on the order, not on the conditions which called it forth", and it added, "To hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913).

This analysis of the judicial function in the administrative process is consistent also with Section 10 (a) and (c) of the National Labor Relations Act which vests in the Board "exclusive" power to prevent unfair labor practices and to remedy their effects. It also recognizes an appropriate sphere for judicial review. As Judge Parker observed, "there is no danger that the decree of the court may be flouted by such modification", for "any action taken by the Commission would then be subject to review by the court, as in the case of other orders * * *" (pp. 912-913).* When the rewritten order comes before the court after full investigation and hearing, and with a complete record, the court is then in a position to determine all matters within its competence clearly and expeditiously.

Nor can it be the meaning of this Court's decision in *Ford Motor Company v. National Labor Relations Board*,

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*As the Board in its memorandum in support of the petition for certiorari points out, Section 5 (b) of the Federal Trade Commission Act, 38 Stat. 717, as amended (15 U.S.C. 45 (b)), which the Fourth Circuit Court of Appeals construed in making its decision, served as a model for Section 10 (d) of the National Labor Relations Act (Bd's Mem., p. 16 and note 5).

305 U. S. 364, that courts are vested with such administrative functions. While this case holds that the Board does not have an absolute right to reconsider its order while its enforcement proceeding is pending before the Circuit Court of Appeals, that decision is not a denial of a special competence of the administrative agency to deal with its remedial orders. For purposes of orderly procedure it was necessary to rule in the *Ford* case that the court be allowed to dispose of the case before it without the intrusion, at the same time, of another tribunal. *American Chain and Cable Company v. Federal Trade Commission*, supra, p. 912. The *Ford* ruling does not foreclose modification or further administrative action after the court's functions have been completed. The reason is stated in the *American Chain and Cable Company* case, "The necessity for modification may be just as urgent in the case of an order which has been affirmed and ordered enforced by the Circuit Court of Appeals * * *" (p. 911). Judge Parker further observed, "* * * after a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute" (p. 912). See, Board's Memorandum, p. 20.

The reasoning of Judge Parker is applicable in the case at bar. The Board is vitally concerned with the execution of the measures it has prescribed in order that it may ascertain whether the effects intended are or can be achieved. This implies the duty on the part of the Board to make corrections or adopt different measures when it appears that the original remedy has failed of its purpose; otherwise, this function of the Board is reduced to a useless ritual. The power to prescribe and supervise remedies carries with it the authority to correct and revise them.

In the *American Chain and Cable Company* case it was held not only that the administrative agency has power to

modify an order which has been affirmed by the court, but also, that it need not first obtain permission of the court to do so. These conclusions are consonant with the scheme of the National Labor Relations Act. If the court's function in a proceeding to remand an order which has been affirmed by the court is not to be a purely formal one, then the only other alternative would be one which places upon the court the duty to appraise the facts not at that time fully investigated and to make a determination of policy upon such tentative investigation." These matters are best left to the agency, which has kept in constant touch with the case, until it has completed its investigations and has arrived at definite findings and conclusions after a hearing, which then could be presented to the court for review. A court should no more properly prevent the Board from determining that an order affirmed by a court should be reconsidered than it can preclude the Board from issuing a complaint. The reason is the same in both cases, namely, the court would be required to exercise functions which are administrative in character.

If the Circuit Court of Appeals for the Fourth Circuit is correct in its views of the administrative process, as it has expressed them in *El Moro Cigar Company* case and in the *American Chain & Cable Company* case, then, it is submitted, the Board was ill-advised in petitioning the court below to vacate the unexecuted back pay provisions of the decree and to remand so much of the case as was affected thereby (R. 229). The court, in turn, should sim-

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" Remand proceedings involve considerable delay. In the present case the Board petitioned the court to vacate and remand on February 4, 1943 (R. 215-230). Not until August 9, 1943, did the court permit the Board to file its petition, and after extensive litigation the court denied the Board's petition on April 19, 1944 (R. 312). Even had the court below granted the Board's petition to remand, over 14 months would have been wasted in unproductive litigation before the Board's authority to take further administrative action would have been established, and the actual work begun.

ply have pointed out that the Board needed no special permission from the court to proceed with its administrative functions. Instead, the court held that it was "not convinced upon the showing in these proceedings that * * * perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311). In so doing the court assumed authority to determine a question of policy contrary to the Board's conclusion, namely, that a particular remedy would effectuate the policies of the Act. Thus the court, summarily appraising the situation, formally held that there was no occasion for further Board action.

Clearly the petitioners were seriously aggrieved by this barrier to final disposition of the case. However, when petitioners presented their motion to remand to the court, it was dismissed without opinion on the very day the court allowed it to be filed. Only a reversal by this Court can now lead the way out of the stalemate.

B. *What Factors Govern Determination Whether a Board Order Embodied in a Decree Should Be Reconsidered?*

1. *The factors are not those governing revision of common law or equity decrees.*

The court below assumed that further administrative action was unwarranted unless the decree contained such defects as would warrant reopening by a chancellor of a judgment entered in an equity or common law proceeding. Thus, the court treated the Board's petition to remand as one "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2 (d) and 3 (b) of the final decree of this Court" (R. 307), and purported to test the Board's petition by equity principles.

But those principles are wholly irrelevant here.* Reluctance to reopen equity decrees and common law judgments stemmed from a desire for the certainty and finality necessary for orderly transactions in the commercial world, and an unwillingness to disturb rights which had been acquired in reliance upon the judgment of the court. But it is a commonplace that the Act does not adjudicate private rights and that labor relations are highly fluid and not put to rest for all time by a single decision. Moreover, it can hardly be said that a decision, as here, which leaves workers with a continuing sense of frustration and awareness of the improvidence of self-organization settles anything.

The decision below laminates onto the flexible administrative-judicial system, designed by Congress as the exclusive means of applying and enforcing the Act, a rigid bill of review procedure involving issues wholly extrinsic to the Act. More importantly, the decision assumes that administrative competence somehow fails to survive a term of court. And, finally, although contempt proceedings may be a future possibility the decision denies the Board the opportunity of identifying and clarifying the issues upon which such a proceeding must rest. The petitioners' concern with these considerations is neither formal nor abstract, for unless the Board is given an opportunity to bring its administrative competence to compliance problems the assurances of organizational freedom which they receive from courts may well prove barren.

2. Relevant considerations.

There is no aspect of the entire administrative process which so directly and plainly reflects and expresses overall

* Compare, National Labor Relations Board v. Hearst Publications, Inc., 309 U. S. 111; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 362, 364; Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 539.

administrative policy as the area of remedy. As this Court has frequently observed remedial functions have been entrusted exclusively by Congress to the Board. It is through its remedies that the agency most directly expresses its expert character, its experience with the special class of problems entrusted to its care. For a court, therefore, to substitute its judgment for that of the administrative agency as to the efficacy of a particular remedy is to deny the expert qualities of administrative functioning at precisely the point where it should command the greatest deference. Nor does the entry of a decree render it improper to entrust the alteration of remedies to the judgment and discretion of the administrative agency within the same limits as the statute has empowered it with the original fashioning of remedies. *American Chain & Cable Company*, supra.

While the Board in its petition to remand recited that it had invoked the lump-sum formula solely because it had presumed on the basis of evidence introduced and representations made by the Companies, that at all times after July 5, 1935, there were less jobs open than old employees available (R. 221), the court held that it was "not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as to composition of the staff of workmen", (R. 309). Contrary to the clear import of the Board's decision (R. 132-134), its petition to remand (R. 221), its motion for judgment (R. 294), and the court's decision on review and enforcement (R. 203), the court held that there were "other difficulties" than job insufficiency which

caused the Board to depart from its ordinary back pay remedy and to devise its lump-sum formula (R. 310). Significantly, the court failed to indicate what these "other difficulties" might be. No "other difficulties" are mentioned in the Board's decision, and none appear in the entire record. The court could have arrived at this conclusion only by substituting its own appraisal of the old evidence for that of the Board.*

While the Board stated that the back pay remedy, "however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against, and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating the purposes of the Act" (R. 228), the court held that the remedy would not bring about "unfair administration of the Act" (R. 310). The court persisted in its view notwithstanding that petitioners specifically called its attention to the fatal distortion of the remedy brought about by the mistake in footnote 185 (R. 334-336). The court thus undertook to decide matters of administrative policy without regard to the practical consequences which the remedy produced. In fact, many relevant circumstances of the case which the Board would consider were not even presented to the court below.

Nor can it be expected that the court can acquire a view of the delicate issues involved here in a proceeding based on affidavits alone. It manifestly requires a conscientious and careful investigation and the use of accounting and investigatory procedures not at the disposal of the court.

* While the Board averred that the respondents had practiced "conscious misrepresentation" concerning the true employment situation (Board's Mem., p. 24; R. 216, 298), and that it had adopted the special lump-sum formula only to accommodate the back pay remedy to the Companies' evidence and representations, the court below held that the back pay provisions of the decree were not obtained by misrepresentation or wrongful conduct of the respondents (R. 310).

C. *The Circumstances of the Instant Case Warrant Administrative Reconsideration of the Back Pay Remedy.*

The case at bar furnishes an apt illustration of the difficulties inherent in the task of "dissipating the continuing effects of prior unfair labor practices", and of the consequences arising if the Board is not given an opportunity to complete its administrative duties.

1. *Assumptions of the Board upon which it predicated its special lump-sum formula were false.*

As discussed above, it is the effects of the Board's order that must be considered. The stated objective was, in consonance with the Act and the Board's established practice, to remedy, as far as possible, the economic ill-effects of the respondents' unfair labor practices, and to "restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132). During the compliance phase of the case the Board was faced with the undeniable fact that this result had not been achieved, and, so it seems, could not be achieved under the order. Assumptions of the Board, which were the basis of the special lump-sum formula, were false (*supra*, pp. 15-17).

2. *Footnote 185 of the formula contains a mistake in its formulation defeating the Board's expressed intent.*

Furthermore, the back pay order was found to contain a mistake in the formulation of footnote 185 (R. 334-336). The Solicitor General in his memorandum points out that the mistake was "entirely harmless in the employment situation then understood to exist by the Board" (Bd.'s Mem., p. 10). However, under the circumstances subsequently disclosed, this mistake reduced the back pay to but a small fraction of the sum intended. Nothing could be clearer than the language used by the Solicitor General (Bd.'s Mem., p. 11):

> The Board admits that the formula contains the mistake which the Unions set forth in their petition and further admits that such mistake renders the formula wholly inaccurate as a measure for back pay.

Instead of restoring the status quo, by reimbursing the claimants to the full extent of their wage losses, the formula reimburses them for less than 1 percent of such losses, according to the respondents' interpretation (R. 225), or approximately 25 percent of such losses according to the Board's rough calculations (Bd.'s Mem. in support of certiorari, pp. 10-12, n. 2).* Thus, even if we were to consider, in the language of the court, what "is apparent on the face of the formula" some form of administrative therapy would nevertheless be required to make the formula speak the truth.

3. The court below improperly construed the Board's order and its own prior decision enforcing it.

The court's opinion reads: "* * * although it is apparent on the face of it [the lump-sum formula] that it does not accord to each individual workman in the group an amount of back pay equal to a full wage from July 5, 1935, to the date of offer of reinstatement, and that it specifically provides a fraction only of such full wage, we held that the Board was within its rights in requiring payment of the fraction of such wage prescribed in the formula" (R. 310). But, the opinion of the court on review and enforcement of the Board's order indicates that, on the contrary, the court then assumed, as did the Board, that, because of curtailed employment, the sum to be apportioned under the formula was the full wages lost by as many of the group as would have earned wages had the respondents acted lawfully, and not that apportionment of the lump

*This estimate is made without regard to possible additional reductions resulting from other infirmities in the formula (Bd's Mem., pp. 12-13, n. 3; 23, n. 7).

sum would compensate them for a mere fraction of the wages lost (R. 203, 207; 119 F.(2d) at pages 914-915). The court as well as the Board, assuming job insufficiency, stated that the formula seeks to "make whole" the group for *all* wages lost by them (R. 169, 171, 210, 212). The Board expressly stated that its formula seeks "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132).

When this section of the opinion is read in conjunction with the court's pronouncement that factors other than uncertainty as to the employment situation were responsible for the remedy as adopted, it seems clear that the court has attributed to the Board an intention to reduce the back pay award because of doubts as to the merits of the case. This is not only utterly unfounded but attributes to the Board a wholly novel remedial principle. It is manifest that it is the province of the Board and not the court to explain the rationale of its orders and their meaning. The court's usurpation of this function here gravely disfigures the entire back pay theory of the Board in this case. As a general matter, a "reinterpretation" by a court of an administrative remedy after the term has passed can well result in a retrospective reversal of the relationship between court and agency.

4. ***The court failed to consider other relevant factors.***

The respondents' tender of the sum of $8,500, and later $5,400, in purported full payment of all wages lost by the claimants was notice to all employees that the statutory promise of immunity was not to be fulfilled, and that, in effect, the efforts of government on their behalf were defeated.[*] A final determination depriving the claimants

[*] Cf. National Labor Relations Board v. Hopwood Retinning Company, Inc., 104 F. (2d) 302 (C.C.A. 2), where the company offered $1,500 in full settlement of the back pay, although a sum in excess of $200,000 was "asserted to be due". The insufficiency of this offer was considered when the company was held in contempt.

of 75 percent to 99 percent of the restitution of wages they lost on account of respondents' unfair labor practices is tantamount to a severe penalty for their lawful collective action. It releases the respondents from their statutory liability at the price of a small fraction of the losses they have caused. But it may not be assumed that what is complained of here is merely that respondents have bought violation of the Act for too cheap a price.

The whole background of the case, the peculiarities of its locale also are factors to be considered. To appreciate the case in its right perspective, the character of the mining community in the Tri-State area of Missouri, Kansas and Oklahoma must be before the eye of the court, if it is to judge at all. In the words of John Campbell, personnel manager of the respondents (R. 34): "There is not much else in this community on which the working man can live except the mines, and that is practically the support of other industry and business in the district. And the men had been on reasonably low wages and, in fact, very low wages up to the time of the strike on account of very low market prices for concentrates. And being down, being out of work a week or 2 weeks, brought most of them to destitution" (R. 44). The cellular insulation of a one-industry district, where the respondents hold a dominant position, truly epitomizes the inequality of bargaining power sought to be balanced by the Act (Section 1). In this situation the psychological effects of unlawful company action find increased resonance. The effects of unfair labor practices are abnormally exaggerated and the evils increased by the passage of time, until they become a permanent shackle upon the right of self-organization. All efforts of the union run into an impassable wall of fear sustained by the ever-present example of the victims of the respondents' discrimination. Men refused employment because of union activity by an employer and blacklisted

by concerted employer policy are effectively eliminated from all gainful occupation. Nor can they find succor in the example of more successful unions. Defeat here means destruction. The respondents, in fact, turned the plight of their own victims into a weapon for their fight against the union, constantly referring to it in the paper published by the company-dominated union which was financed by respondents' money.[*]

In this situation the decision of the Board in 1939 and the decree of the court in 1941, far from restoring freedom to the employees, have become instruments of continuing restraint. For respondents shifted their campaign against the petitioners "to the more successful front of extensive judicial review",[**] and in this impassable swamp of procedure the case has been bogged down for nearly six years.

As part of the unified administrative process the court below could not properly have precluded the Board from transforming these various considerations into reality. The Board was fully justified in deciding that reconsideration of its order was necessary to effectuate the policies of the Act.

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[*] The following is an example taken from the paper of the Tri-State (Company) Union (R. 55-56):

"The head of this Union, his name is Mike,
He and Joe Nolan were in the lead of the Parade with Pick Handles when we broke the strike.
Mike said let the yellow bellys stay on relief,
And drink their dried milk and eat canned beef.
Because our little Union is just doing fine,
Let the rest of the strikers stay on the soup line.
Their are losing their cars and selling their hogs,
For the International Union has gone to the Dogs".

[**] Corning Glass Works v. National Labor Relations Board, 129 F. (2d) 967, 974.

D. *Irrespective of Any Other Consideration, the Remedy Became Inapplicable for the Period of Discrimination Following the Close of the Hearing by Reason of Changed Circumstances.*

If this Court should hold that the Circuit Courts of Appeals have the power to foreclose the Board from exercising its judgment as to whether the remedy should be modified, then, it is submitted, the court below used this power improperly. The arguments made above would then be utilized at this juncture. Since no useful purpose is served by repetition, we proceed to a consideration of the final issue.

1. *The remedy was in greater part prospective in character, and based upon hypothesis and assumption instead of proven fact.*

The hearing commenced on December 6, 1937, and ended on April 29, 1938 (R. 27). The findings, conclusions, and order of the Board were entered October 27, 1939 (R. 25). The Board found that the discrimination period began July 5, 1935, and since offers of reinstatement* were made by the Companies on August 23, 1941 (R. 224), after entry of the enforcing decree, the back pay period ends on that date. Therefore, the back pay order in greater part operated prospectively, for a continuing period in the future—after April 29, 1939, to August 23, 1941. "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact". *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F.(2d) 658, 663 (C.C.A. 2).

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*The Lead Company refused to offer reinstatement to James Curry (R. 224, n. 7), a claimant named in paragraph 2 (c) of the reinstatement and back pay order (R. 168, 172, 176). Either the Company is flouting the order, or else after enforcement some new circumstance has been discovered which the Company believes warrants its refusal to reinstate Curry. If the latter alternative be the case, the Company has put into practice the rule petitioners seek to establish.

The Board had no way of forecasting the employment situation likely to exist after the hearing. It had to rely upon the respondents' evidence and representations during the hearing that the condition of severely curtailed employment was lasting (*supra*, pp. 7-9). As late as December 13, 1938, the respondents asserted, in their argument to the Board in Washington, that "Mines are closing daily" (R. 22). The Board was therefore warranted in assuming, from all that then appeared, that the condition of job insufficiency, which the respondents had shown to exist during the hearing, would continue in the future (R. 132). Consequently, the Board invoked the lump-sum formula as a general method for computing back pay for the period of discrimination subsequent to the hearing (R. 133-134).

2. A continuing or prospective back pay order is subject to revision when subsequent developments reveal that it fails to achieve the results intended.

The Board assumed that after the close of the hearing there would continue to be less jobs open than old employes available (R. 132-134).[4] This assumption turned out to be incorrect (R. 225). The remedy prescribed in advance fails to achieve its purpose in the employment situation as it actually developed.

Directly in point is the decision of the Circuit Court of Appeals for the Second Circuit in *Corning Glass Works v. National Labor Relations Board*, 129 F.(2d) 967. In that case the court, after enforcement, remanded the continuing portion of the back pay remedy to the Board for its administrative revision. The court stated (p. 972):

> It is true that, in proper circumstances, the continuing nature of a back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order.[5]

[5] Similar need for adjustment, because of changed circumstances, may arise in connection with an injunction decree

(United States v. Swift & Co., 286 U. S. 106, 114-115) or a decree for alimony (19 C. J. 273 ff).

Recognizing the possibility of changed circumstances, this Court in *Franks Bros. v. National Labor Relations Board*, 321 U. S. 702, 705-706, observed:

> For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. * * * the Board may, in proper proceedings and upon a proper showing, take steps in recognition of changed circumstances.

Since a portion of the back pay remedy in question here is based upon assumption instead of proven fact, it could not have been intended to fix permanently the remedial relief of back pay for such period without regard to the actual facts which might develop." The facts hypothesized by the Board never materialized. At least for the prospective period, the court below should not have foreclosed administrative reconsideration of the remedy appropriate to the true employment situation.

CONCLUSION

For the foregoing reasons, the decision and orders of the court below should be reversed with the directions to vacate paragraphs 2 (d) and 3 (b) of the decree and remand to the Board so much of this cause as is affected by said paragraphs for further proceedings.

Respectfully submitted,

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December, 1944.

" Compare, McQuay-Norris Mfg. Co. v. National Labor Relations Board, 119 F. (2d) 1009 (C.C.A. 7); International Ass'n of Machinists v. National Labor Relations Board, 311 U. S. 72, 82-83; Century Metalcraft Corp. v. Federal Trade Commission, 112 F. (2d) 443, 447 (C.C.A. 7).

APPENDIX

NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized

sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 5. * * * The Board may, * * * prosecute any inquiry necessary to its functions in any part of the United States. * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any

time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of addition evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any,

for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * *

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. * * *